88-1688

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

RICHARD L. TURK,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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58pp

QUESTIONS PRESENTED FOR REVIEW

A. May a claim of Fifth Amendment privilege be made both as to items of expenses and income, as well as their sources, on a federal income tax return?

B. Is a previous conviction on a charge similar to that which an individual fears present prosecution sufficient grounds to validly invoke the Fifth Amendment privilege on a federal income tax return?

C. In ruling on a motion for a judgment of acquittal, must the trial court also consider the evidence heard only in chambers, on questions of fact?

D. Is the validity of the exercise of the Fifth Amendment privilege a question of law or fact?

Page

TABLE OF CONTENTS

TABLES OF AUTHORITY

Page

CASES

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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RICHARD L. TURK

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard L. Turk, by his attorney, respectfully prays that a writ of certiorari issue to review the final Order

of the United States Court of Appeals for the Ninth Circuit, filed February 16, 1984.

OPINIONS BELOW

The decision at the trial court level was made without opinion. The judgment of the trial court appears in the Appendix at pages C-1 to C-7. The opinion of the U.S. Court of Appeals for the Ninth Circuit is found at 722 F2d 1439 . The full text of it appears in the Appendix at pages A-1 to A-9. The opinion of the Ninth Circuit on the petition for rehearing was not reported. Its full text appears in the Appendix at pages B-1 to B-2.

JURISDICTION

The opinion of the U.S. Court of Appeals was entered on December 22, 1983. Upon a timely petition for rehearing, an Order was entered on February 16, 1984,

denying any rehearing. The jurisdiction of this Court is invoked under 26 USC §1254(1).

STATUTES INVOLVED

United States Constitution, 5th Amendment, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 USC §7203, which states:

> Any person required under this title to ... . make a return . . . who willfully fails to . . . make such return . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, togegether with the costs of prosecution.

STATEMENT OF THE CASE

This cause was begun upon the filing of a three count information against the Petitioner in the United States District Court for the District of Montana. All three counts were for violations of 26 USC §7203. The years involved in the counts were 1978, 1979 and 1980.

The Petitioner was arraigned and entered a plea of not guilty. Trial commenced on December 9, 1982. On December 12, 1982, the jury returned a verdict of guilty on all three counts. On January 13, 1983, the Petitioner was sentenced to serve six months, pay a fine of $1,000.00 and pay costs of prosecution, on each count, to run consecutively.

Since 1975, the Petitioner has filed tax returns on which he objected to specific questions on the grounds of the Fifth Amendment, as well as other consti-

tutional grounds. The Petitioner was not charged for failure to file for the years 1975 through 1977.

Prior to 1975, the Petitioner had been convicted on Interstate Commerce Commission charges involving the transportation of goods in interstate commerce under an improper leasing agreement.

Without discussing specifics which would waive the Petitioner's rights against compulsory self-incrimination, the Petitioner had reason to fear that the I.C.C. would bring similar charges against him during 1978, 1979, and 1980. The specifics were testified to at the trial, in chambers, and the testimony and evidence sealed, to protect the Petitioner's rights. This testimony was taken following the conclusion of the government's case and prior to the presentation of the Petitioner's defense in open court.

ARGUMENT FOR ALLOWING THE WRIT

A. As to Question A. the type of personal income tax return filed by the Petitioner herein has met with completely opposing opinions in the different United States Circuit Courts of Appeals, and this conflict meeds to be resolved by this Court.

The conflict is best summed up in the opinion in U.S. v. Neff, 615 F2d 1235 (9th Cir. 1980) at pages 1238 and 1239:

> The Supreme Court has stated that the privilege against self-incrimination, if validly exercised, is an absolute defense to a section 7203 prosectuion for failure to file an income tax return. Garner v. United States, supra, 424 U.S. at 662-63, 96 S.Ct. at 1186-1187. The Court has also held, however, that the privilege does not justify an outright refusal to file any income tax return at all. United States v. Sullivan, 274 U.S. 259, 263, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). Furthermore, an objection may properly be raised only in response to specific questions asked in the return. Id. See Garner v. United States, 501 F.2d 228, 239 n.18 (9th Cir. 1974) (en banc), aff'd Garner v. United States, supra, 424

U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370.

We are here faced with a case in which the taxpayer did assert his privilege in response to specific questions in the tax return form, but did so on such a wholesale basis as to deny the IRS any useful financial or tax information.[2] Other circuits, faced with similar wholesale assertions of the privilege against self-incrimination, have concluded that a tax return form which contains no information from which tax liability can be calculated does not constitute a tax return within the meaning of the IRS laws. Once these courts determine that the taxpayer has filed no return, simple application of the Sullivan precedent, which states that the Fifth Amendment will never justify a complete failure to file a return, invalidates the Fifth Amendment defense. E.g., United States v. Irwin, 561 F.2d 198, 201 (19th Cir. 1977), cert. denied, 434 U.S. 1012, 98 S.Ct. 725, 54 L.Ed2d 755 (1978); United States v. Silkman, 543 F.2d 1218, 1219-20 (8th Cir. 1976) (per curiam), cert. denied, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977); United States v. Daly, 481 F.2d 28, 30 (8th Cir.) (per curiam), cert. denied, 414 U.S. 1064, 94 S.Ct. 571, 38 L.Ed.2d 469 (1973).

Although we recognize the ease with which the logic used in these

cases would resolve the issue before us, we conclude that such reliance upon the definition of a tax return is inappropriate, because it lacks independent Fifth Amendment analysis. Moreover, the usefulness of this definitional approach is too limited because it is confined to facts such as those presented here: the wholesale assertion, albeit in response to specific questions, of the privilege against self-incrimination. In settings in which the Fifth Amendment right has been more discretely asserted, it would be difficult to conclude that no return has been filed, and, therefore, inappropriate to apply this definitional analysis.[3] We therefore choose not to follow the lead of the cited cases. We believe that the better approach to this and future Fifth Amendment tax return cases is to apply more traditional Fifth Amendment analysis.[4]

Footnote 3 of that opinion at page 1239 states:

Moreover, we are not certain that these circuit court decisions comport with Supreme Court precedent. The cases indicate that the taxpayer may never assert his privilege against self-incrimination in lieu of tax form responses essential to the calculation of tax liability. This rule, which limits the tax form questions to which a Fifth Amendment response is proper to those questions not essential to tax liability calculation,

> necessarily limits--perhaps too much --the scope of the Supreme Court's declaration in Garner that the Fifth Amendment may be asserted on a tax return. 424 U.S. at 662, 96 S.Ct. at 1186.

The Ninth Circuit, with the opinion in Neff, joined the Second Circuit in its opinion in U.S. v. Barnes, 604 F2d 121 (1970) at page 148 where the Court states:

> However, as is made clear in United States v. Sullivan, 274 U.S. 259, 263-64, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), the right to make a valid claim of privilege is available even as to amount of a taxpayers income, as well as any other item on the return which could legitimately cause self-incrimination.

Besides the disagreement with the Tenth and Eighth Circuits set forth in Neff, the Fifth Circuit also disagrees with the Ninth and Second Circuits. In its opinion in U.S. v. Johnson, 577 F2d 1304 (1978), at page 1311, the Fifth Circuit stated:

> While the source of some of Johnson's income may have been privileged, assuming that the jury believed his

> uncorroborated testimony that he had illegal dealings in gold in 1970 and 1971, the amount of his income was not privileged and he was required to pay taxes on it. He could have complied with the tax laws and exercised his Fifth Amendment rights by simply listing his alleged ill-gotten gains in the space provided for "miscellaneous" income on his tax form. (Emphasis in the original.)

Thus there is without question an irreconcilable difference of opinion between the Circuits over the issue of a taxpayer's ability to object to items of expenses and income on his tax return as well as their sources.

This issue must be resolved in this case as the validity of the Petitioner's Fifth Amendment claim rises or falls on his ability to object to the amount of his income and expenses as well as their source. In addition, the opinion of the Court of Appeals in this case appears to be in conflict with both Neff and Barnes in that it effectively takes away the

Petitioner's right to object to items of expenses.

The Petitioner's position is that a taxpayer may legitimately object to amounts of income and expenses as well as their sources, on a personal tax return. Petitioner finds support for this position in the opinion of this Court, in U.S. v. Sullivan, as cited in Neff and Barnes, and the opinion of this Court in Garner v. U.S., as cited in Neff. Further support is found in the opinion of the Ninth Circuit in Neff, supra, and the opinion of the Second Circuit in Barnes, supra.

However, the cases of U.S. v. Irwin, (10th Cir.), U.S. v. Silkman, (8th Cir.), U.S. v. Daly, (8th Cir.), as cited in Neff, as well as U.S. v. Johnson, supra, and the opinion of the Appeals Court in this case are in direct conflict with

this position.

Therefore, the writ should be granted to resolve this conflict and to clarify this Court's position as set forth in Sullivan, supra, and Garner, supra.

Otherwise there will continue to be a wide disparity between the treatment of those charged with similar offenses, depending solely in which Circuit they are changed.

B. As to Question B., the Ninth Circuit stated in U.S. v. Neff, at page 1239:

> To claim the privilege validly a defendant must be faced with "substantial hazards of self incrimination,'" California v. Byers, supra, 402 U.S. at 429, 90 S.Ct. at 1538, that are "'real and appreciable' and not merely 'imaginary and unsubstantial.'" Marchetti v. United States, supra, 390 U.S. at 48, 88 S.Ct. at 702, quoting in part Rogers v. United States, 340 U.S. 367, 374-75, 71 S.Ct. 438, 442, 95 L.Ed. 344 (1951). Moreover, he must have "reasonable cause to apprehend [such] danger from a direct answer" to questions posed to him. Hoffman v. United States, 341

> U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). The information that would be revealed by direct answer need not be such as would itself support a criminal conviction, however, but must simply "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Id. See also Hashagen v. United States, 283 F.2d 345, 348 (9th Cir. 1960). Indeed, it is enough if the responses would merely "provide a lead or clue" to evidence having a tendency to incriminate. Id. at 348.

The gist of this issue is the quote of this Court from Hoffman, supra, concerning "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."

Applying this to the case at bar, the question is whether or not items of expense and income, if reported on the Petitioners income tax return, would have furnished such a link in the chain of evidence needed to prosecute the Petitioner for a federal crime. The Petitioner's position is that the inclusion

of these items would have done so.

The reasoning is as follows: One of the pieces of evidence needed in prosecution of I.C.C. violations (which are federal crimes), is that the Petitioner had hauled material in interstate commerce. The Petitioner is a self-employed truck driver, who owns his own equipment. I.R.S. regulations and the I.R.C. require the listing of all income and sources as well as a itemization of expenses.

The Petitioner could not exclude income earned in violation of the law and/or its attendant expenses, without being guilty of tax evasion and fraud.

If the Petitioner listed the income, by regulation he must also list its source. If he objected to the source (as even Johnson, supra, allows) and included the income, the fact of including the income can be used against him (See Barnes, supra).

In this case, the large amount of income itself would be evidence that the Petitioner had travelled interstate, in a similar manner that the large amount of income listed under "miscellaneous" in Barnes was used to prove that the defendant there had engaged in the sale of narcotics.

This leaves, as the only alternative, objecting to the listing of this income. Since this income could not be excluded from other income, the Petitioner would have to object to every place on the tax return which called for totalling of the income. (As he did).

In a like manner, if the Petitioner had listed this income, he would also have to list the attendant expenses. The listing of these expenses would be, by itself, evidence that the Petitioner had travelled in interstate commerce, as the

expenses attendant to interstate commerce are by their nature much larger than intra-state, as in-state travel would not produce motel expense, meals, etc.

Since just listing these expenses would "provide a link," the Petitioner would have to object to listing them. Without listing the attendant expenses, the Petitioner could not list the net income, and therefore would have to object to that and to all other requests for income totals. (As he did).

In addition, to the fact that merely listing this income and/or its attendant expenses would "provide a link," if the Petitioner did so list income and expenses, should he be called upon to verify these amounts by audit, he would be faced with either revealing the sources and thereby incriminating himself, or with refusing to reveal the sources and then being

charged with tax evasion for putting down expenses he could not verify.

Therefore, it appears to be quite clear that the inclusion of these items on the Petitioner's tax return would have furnished at the very least "a link in the chain of evidence needed to prosecute the claimant for a federal crime."

Therefore, it is the Petitioner's position that the previous conviction of the Petitioner, coupled with the incriminating nature of placing that particular income and expenses on his tax return, gave him sufficient grounds to validly invoke the Fifth Amendment on his federal income tax return.

Petitioner finds support for this position in the long line of cases decided by this Court, both prior to and following Hoffman, supra, concerning the invocation of the Fifth Amendment pri-

vilege, coupled with the decision of this Court in Garner, supra, which explicitly stated an individual's right to claim the Fifth Amendment privilege, at least in non-tax matters, on the federal income tax return.

Therefore, the law is very well established by this Court on this issue. However, the decision of the Court of Appeals in this case is completely opposite of this Court's rulings. To allow this decision to stand without review would be to implicitly agree with the total departure by the Court of Appeals from the applicable decisions of this Court, and thereby impliedly overrule those decisions of this Court.

C. As to Question C., first of all, this appears to be a question unique to this type of case. There has been, to this date, no procedure established for

dealing with the delicate position described in the quote from Judge Learned Hand contained at page 1290 in Neff, supra, i.e., of being faced with having to incriminate oneself in order to be able to prove that one should not have to incriminate oneself.

The procedure used in this case I believe to be both novel and the best developed so far. In this case, the Petitioner requested, after the close of the government's case and prior to his presentation of his defense in open court, that a hearing be held on the question of the validity of his claim of privilege. The Petitioner also requested that the hearing be held in chambers and that the testimony and evidence be sealed, to protect his Fifth Amendment privilege. This gave him the opportunity to fully disclose his reasons for fearing prosecution without fear that what was said or introduced

could later be used against him. The trial court ruled on the basis of this hearing that the Petitioner had validly asserted his Fifth Amendment privilege, but inexplicably refused to dismiss the case, which led to the appeals herein.

The problem that arose in this case with this procedure, has to do with the Petitioner's requests for judgments of acquittal, made both at the conclusion of the hearing and at the conclusion of all the evidence.

The Petitioner's position has always been that the Fifth Amendment privilege was validly claimed. However, assuming for sake of argument that the claim of privilege was erroneous, there is a question of fact as to whether or not the claim was made in good faith.

The appeals court in its opinion stated that in reference to this question

of fact, " . . . the jury's verdict resolves that issue against Turk, . . .". This brings us directly to the question presented for review, because according to the opinion of the appeals court, there is no room for consideration of the evidence presented in chambers in ruling on this question of fact.

Since it would be impossible, without waiving the privilege asserted on the return, to give the testimony heard in chambers to the jury, there must be two triers of fact in a case of this sort. Firt of all, the jury is the trier of fact as to all evidence presented to them. However, and perhaps even more importantly, the trial judge is the trier of fact as to issues of fact about which there is also testimony heard in chambers which is not heard by the jury.

In cases of this sort, on the issue

of good faith erroneous claim of privilege, there is testimony in front of the jury, but in addition, there would be evidence applicable to this issue which would only be heard by the trial judge in chambers. Therefore, in reviewing the appropriateness of any rulings on this issue of fact, the standard of review must be applied not only to the jury and the evidence presented to them, but also to the judge and both the evidence presented to the jury and the evidence heard only by him in chambers.

This was not done in this case, and that explains in part the appeals court ruling that "the record shows that there is sufficient evidence to support Turk's conviction." This is borne out also by the closing statement of the opinion of the appeals court that ". . . since the jury found that it was not exercised in

good faith, the conviction is affirmed." (emphasis added).

The appeals court did not review (although asked to do so) the trial court's ruling on the issue of fact concerning the Petitioner's good faith, which ruling was made by denial of Petitioner's motion for a judgment of acquittal. When you also consider the evidence heard in chambers, in addition to that heard in frong of the jury, on the issue of good faith, no rational trier of fact could have concluded that beyond a reasonable doubt, the claim of privilge was exercised in bad faith. This is the standard of review set by this Court in Jackson v. Virginia, 443 US 307, 318-319 (1979).

Therefore, by refusing to apply this standard to the trial court's ruling on the issue of good faith, and relying solely on the jury's finding to settle

this issue, the appeals court has so far departed from the accepted and usual course of judicial proceedings so as to demand review by this Court.

Even if the appeals court's ruling can be defended on the grounds that this was a completely new procedure used in the trial court, and their neglect in applying the proper principals to the issues was because of their lack of experience in reviewing cases employing this procedure, review by this Court is demanded to prevent the appeals court's erroneous application of the proper principals from becoming the standard used by other courts in similar circumstances.

D. As to Question D., the appeals court made the ruling that the validity of the exercise of the Fifth Amendment privilege is a question of law. The only authority cited for that proposal was

U.S. v. Neff, supra. To my knowledge, this is the first time this issue has been addressed by a court of appeals, and unfortunately, the Neff case does not back up the appeals court's statement.

At page 1240 of the Neff decision, the appeals court states, "If the trial judge decides from this examination of the questions, their setting, and the peculiarities of the case, that no threat of self-incrimination exists, . . .".

This merely states that the trial judge makes a decision. It does not state it is either a question of law or fact. Since it is based on the absence and/or presence of certain facts, it would appear to be a factual determination.

The fact that the trial court is called upon to make that decision is not of itself determinative of whether it is a question of law or fact. In search

warrant and confession cases, the trial court is called upon to rule on the admissability of the warrant or confession, yet this is also a proper question of fact to be presented to the jury.

The relevance to the case at bar lies in the appeals court's review of the trial court's finding that the privilege was validly exercised. The Petitioner did not raise or question this issue, as he was satisfied that the trial court had ruled in his favor on that issue. The correctness of that ruling was not raised by the government either. What was raised by the Petitioner was the issue, given the correctness of the trial court's ruling, why the trial court erred in not granting a judgment of acquittal.

If the issue were one of a question of fact, the appeals court would, absent

plain error or a claim of error, be limited to reviewing the application of that finding of fact, i.e., given that the trial court found that the claim was valid, should the motion for judgment of acquittal been granted?

Also, the standard of review is different. In this case the appeals court considered this issue to be one "freely reviewable on appeal," whereas a question of fact is judged by a different standard (See Jackson v. Virginia, supra.), which would give the trial court's ruling on this issue more effect.

While the Petitioner feels that the appeals court erred in reviewing the trial court's ruling on this issue, regardless of whether it was a question of law or fact, because there was no plain error in the ruling and no claim of error, the Petitioner's position is that

this issue is a question of fact. Considering this issue as one of a question of fact would mandate a judgment of acquittal for the Petitioner.

This issue is a very important question of federal law which has just been decided by the court of appeals (and wrongly, in the opinion of the Petitioner), and this issue has not been settled by this Court. Therefore, review is demanded to settle this issue by this Court now, to prevent further error or differing opinions by the Courts of Appeals.

CONCLUSION

This case presents to this Court its best opportunity to date of resolving the issues inherent with the claim of Fifth Amendment privilege on the federal income tax return.

If review is granted, this Court will have the opportunity to resolve a major

conflict between the Circuit Courts of Appeals over whether or not there is a right to object to the listing of income and expenses as well as objecting to their source. This Court would have the opportunity to state whether or not the procedure outlined in Neff, supra, is the correct one to follow in cases of this nature.

If review is granted, this Court will also have the opportunity to clarify its position expressed in Garner, supra, applying the principals involved to a case where the claim of privilege was actually raised on the return, and the opportunity to clarify just how the Fifth Amendment principals outlined in Hoffman, supra, and in other decisions of this Court, apply to a case of this nature.

If review is granted, this Court will

also have the opportunity to comment on the procedure used at the trial court level in this case, to preserve the claimant's Fifth Amendment rights, and at the same time give the claimant the freedom to express fully his reasons for making the claim. This Court will also have the opportunity to settle the proper procedures to be used for deciding issues raised both in chambers and in the courtroom, and also settle procedures to be used for review of these rulings.

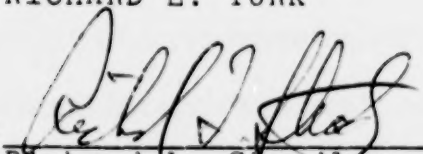
If review is granted, this Court will also have the opportunity to settle an important question of federal law which has not yet been settled by this Court concerning the issue of the validity of the Fifth Amendment claim raised on a federal income tax return, and also to settle the procedure used to review rulings on this nature.

More and more individuals are resorting to attempts to raise the claim of Fifth Amendment privilege in connection with their federal income tax returns. Without the clear guidance of this Court, they will continue to suffer the consequences of interpreting the past decisions of this Court in error, and the federal courts of appeals will continue to be divided on interpretation of these cases. Review of this case by this Court will give that clear guidance needed to prevent erroneous claims and the injustice of differing positions held by the different Courts of Appeals.

WHEREFORE, Petitioner prays that a writ of certiorari issue to review the decision of the U.S. Court of Appeals for the Ninth Circuit, herein.

Respectfully submitted,

RICHARD L. TURK

BY: 

Richard L. Stradley
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Phone: (406) 642-3774

CERTIFICATE

I, the undersigned, Richard L. Stradley, Counsel for the Petitioner herein and a member of the Bar of this Court, do hereby certify that I have this dated mailed, by U.S. Mail, first-class postage pre-paid, three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to counsel for the Respondent, the honorable Lorraine D. Gallinger, Assistant U.S. Attorney, P.O. Box 1478, Billings, Montana, 59103,

on this the 13th day of April,
1984.

Richard L. Stradley

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 22 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	) No. 83-3006
RICHARD L. TURK, Defendant-Appellant.	) D.C. No. CR 82-07-01 WDM

OPINION

Appeal from the United States District Court For the District of Montana
The Honorable William D. Murray, Presiding Argued and Submitted
October 3, 1983

Before: BROWNING, HUG, and TANG, Circuit Judges.

HUG, Circuit Judge:

Richard L. Turk appeals his conviction for willful failure to file federal income tax returns for the years

1978, 1979, and 1980 in violation of 26 U.S.C. § 7203. On the returns for these years, Turk provided his name and social security number, but objected to all other questions on the basis of the fifth amendment to the United States Constitution as well as other grounds. A section 7203 conviction may not be based upon a valid exercise of the fifth amendment privilege against self-incrimination. Garner v. United States, 424 U.S. 648, 662 (1976). Whether the taxpayer validly exercised his fifth amendment privilege is a question of law. United States v. Neff, 615 F.2d 1235, 1239-1240, (9th Cir. 1980). Because section 7203 proscribes "willful" failures to make returns, good faith in the assertion of the privilege would entitle a taxpayer to acquittal of a section 7203 charge. Garner, 424 U.S. at 663 n.18. The taxpayer's good faith

is a question of fact. United States v. Carlson, 617 F.2d 518, 523 (9th Cir. (1980).

In the present case, the trial judge heard in camera testimony concerning the justification for Turk's exercise of the privilege. The judge stated that the privilege had been properly exercised and then ordered the case to proceed to the jury for determination of the factual question of whether the privilege had been exercised in good faith. The basis for the court's ruling is unclear. The Government contends that the meaning of the court's ruling was that the privilege had been properly claimed in a timely manner on the tax return as required by Garner, but that the justification for the claim was inadequate. Therefore, the Government argues, the privilege had not been validly exercised, and the court pro-

perly submitted to the jury the remaining question of whether the claim had been made in good faith. Turk, on the other hand, contends that the court ruled that the privilege had been validly exercised, and thus the case should have terminated at that point without submission to the jury.

We need not determine whether the district judge held the exercise of the privilege to have been valid or invalid, because the validity of the exercise of the fifth amendment privilege is a question of law freely reviewable on appeal. If we hold that the privilege was validly exercised by Turk, we must reverse. If we hold that the privilege was not validly exercised, the district judge correctly submitted the case to the jury for the determination of the good faith issue. Because the jury's guilty verdict resolves

that issue against Turk, we would then be required to affirm. We therefore turn to the question of whether the privilege against self-incrimination was validly exercised.

The Supreme Court has clearly stated that the privilege against compulsory self-incrimination does not justify a complete failure to file a return. United States v. Sullivan, 274 U.S. 259, 263-64 (1927). Furthermore, objections based on the privilege may properly be raised only in response to specific questions asked in the return. Neff, 615 F.2d at 1238. Turk did not object to specific questions, but rather filed a blanket objection to all questions on the return. Examination of Turk's justification for this claim of the privilege indicates that he did not validly claim the privilege.

Turk did not maintain that answers to specific questions on the tax form could incriminate him, but rather that his accurate completion of the return could subject him to an audit, at which he would have to produce documents to substantiate deductions. Turk does not claim that anything in the tax form itself required incriminating answers, but only that he would be unable to substantiate deductions without producing incriminating information. Just as a person cannot claim the privilege and refuse to disclose income because it came from a criminal source, Sullivan, 274 U.S. at 263-64, so a person cannot refuse to file a return on his income just because substantiating deductions might incriminate him.

If there should be an audit or a trial to determine his tax liability,

Turk remains free to refuse to produce any documents or evidence that may incriminate him. The result is simply that his tax liability must be established without that evidence. The mere possibility of this consequence does not justify his failure to file a meaningful return. We conclude that the fifth amendment privilege was not validly exercised.

Turk also asserts that the evidence was insufficient to support his conviction under section 7203. This court must examine the evidence in the light most favorable to the Government. The inquiry is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). The record shows that there is sufficient evidence

to support Turk's conviction.

Turk challenges the admission into evidence of his 1975 and 1976 tax returns as irrelevant and prejudicial. Rule 404(b) of the Federal Rules of Evidence allows evidence of other crimes, wrongs, or acts to be admitted to show intent. The trial court's evidentiary rulings will be disturbed on appeal only upon a showing of abuse of discretion. United States v. Federico, 658 F.2d 1337, 1342 (9th Cir. 1981). The trial court did not abuse its discretion in admitting evidence of the earlier returns.

Finally, Turk argues that the trial court's comments to the jury during closing arguments denied Turk his right to a fair trial. The judge's remarks to the jury were appropriate and did not constitute error.

Since we have determined that the

fifth amendment privilege against self-incrimination was not validly exercised as a matter of law, and since the jury found that it was not exercised in good faith, the conviction is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 16 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 83-3006
	)	D.C. No. CR
RICHARD L. TURK,	)	82-07-01
	)	WDM
Defendant-Appellant.	)	

ORDER

Appeal from the United States District Court For the District of Montana

Before: BROWNING, HUG, and TANG, Circuit Judges.

The panel has voted to modify the Opinion heretofore filed in this case by replacing the sentence on page 3, lines 17-19 "Turk . . . return" with the following:

> Turk did not select specific questions to which he objected, but, rather, filed objections to all questions other than his name and social security number. This is the type of "wholesale objection" involved in Neff.

The panel as constituted in the above case has also voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

FILED
& entered
JAN 13 1983
LOU ALEKSICH, JR. CLERK
By Dora Lou Sevener
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD L. TURK, Defendant.	No. CR-82-7-Bu Criminal Information in three counts for violation of Title 26, Section 7203 JUDGMENT

On this 13th day of January, 1983, came Allen McKenzie, Esq., Assistant United States Attorney for the District of Montana, and the defendant appearing in his proper person, and represented by his counsel Richard L. Stradley, Esq.,

And the defendant having been convicted by a verdict of the jury, duly

and regularly impaneled and sworn to the offenses charged in Counts I, II and III in the above entitled cause, to-wit:

COUNT I - That during the calendar year 1978 the defendant, who was a resident of the city of Butte, State and District of Montana, had and received a gross income of $30,502.05; that by reason of such income he was required by law, following the close of the calendar year 1978 and on or before April 15, 1979, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Montana or to the Director, Internal Revenue Service Center, Western Region, Ogden, Utah, stating specifically the items of gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said

District Director of Internal Revenue, to the said Director of the Internal Revenue Center, or to any other proper officer of the United States; COUNT II - That during the calendar year 1979 the defendant, who was a resident of the city of Butte, State of Montana, had and received a gross income of $38,815.99; that by reason of such income he was required by law, following the close of the calendar year 1979 and on or before April 15, 1980, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Montana, or to the Director, Internal Revenue Service Center, Western Region, Ogden, Utqa, stating specifically the items of gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to

make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States; and COUNT III - That during the calendar year 1980, the defendant, who was a resident of the city of Butte, State of Montana, had and received a gross income of $57,448.52; that by reason of such income he was required by law, following the close of the calendar year 1980 and on or before April 15, 1981, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Montana, or to the Director, Internal Revenue Center, Western Region, Ogden, Utah, stating specifically the items of gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing

facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

And the defendant having been asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS BY THE COURT ORDERED AND ADJUDGED that the said defendant Richard L. Turk, having been found guilty to the offense charged in Count I of the information, be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment for the term of six(6)

months, and that he be fined the sum of One Thousand and no one-hundreths dollars ($1000.00), and be imprisioned until payment of said fine, or until otherwise discharged according to law; and the defendant Richard L. Turk, having been found guilty to the offense charged in Count II of the information, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for the term of six (6) months, and that he be fined the sum of One Thousand and no one-hundredths dollars ($1000.00), and be imprisoned until payment of said fine, or until otherwise discharged according to law; and the defendant Richard L. Turk, having been found guilty to the offense charged in Count III of the information, be committed to the custody of the Attorney General of the United States, or his

authorized representative, for imprisonment for the term of six (6) months, and that he be fined the sum of One Thousand and no one-hundredths dollars ($1000.00), and be imprisoned until payment of said fine, or until otherwise discharged according to law.

IT IS FURTHER ORDERED AND ADJUDGED that the sentences herein imposed on Count I, Count II and Count III run consecutively with each other.

IT IS FURTHER ORDERED that the defendant pay the costs of prosecution.

Done and dated this 13th day of January, 1983.

/s/ W.D. Murray
W.D. Murray
Senior United States
District Judge.